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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL GALLEGOS,

Defendant and Appellant.

B203498

(Los Angeles County
Super. Ct. No. NA056202)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard R. Romero, Judge. Modified and, as so modified, affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant
Attorney General, Yun K. Lee and Laura J. Hartquist, Deputy Attorneys General,
for Plaintiff and Respondent.

Jose Manuel Gallegos appeals the judgment entered following his conviction by jury of two counts of attempted murder committed for the benefit of a criminal street gang in which he personally discharged a firearm causing great bodily injury, and unlawful possession of a firearm for the benefit of a criminal street gang. (Pen. Code, §§ 664/187, subd. (a), 186.22, subd. (b)(1)(A), 12022.53, subd. (d), 12021, subd. (a)(1).)¹ The trial court sentenced Gallegos to state prison for a term of 39 years and 8 months plus 50 years to life.

Gallegos contends the trial court erroneously failed to instruct the jury on voluntary manslaughter based on imperfect self-defense, the reasonable doubt instruction is defective and the full consecutive term imposed on count two must be modified. We reject Gallegos' claims of instructional error but agree the full term consecutive sentence imposed under section 667, subdivision (c) on count two must be recomputed under section 1170.1. As so modified, the total term imposed is 26 years and 4 months plus 50 years to life in state prison.

FACTS AND PROCEDURAL BACKGROUND

1. The prosecution's evidence.

On March 9, 2003, just before 8 p.m., Raymond Kratt was walking to his apartment in Long Beach from the corner market. As he went through a furniture store parking lot on 7th Street, Kratt was confronted by three or four individuals, including Gallegos and Jose Casteneda. Kratt had seen Gallegos and Casteneda around the video store that was connected to the furniture store parking lot but had never spoken to them. Gallegos accused Kratt of keying his car with the name of a local Asian gang. Kratt denied the allegation. Gallegos said if he found out Kratt was responsible, he would come after Kratt and his family and kill them. At that point, one of Gallegos' companions kicked Kratt in the face.

¹ Subsequent unspecified statutory references are to the Penal Code.

Kratt went home and told his cousin, Veasna Moun (Veasna), that he had been jumped and kicked in the face. They decided to return to the scene to confront the assailants. When they arrived at the parking lot, the individuals present scattered. Kratt and Veasna followed two of them. Kratt stopped in front of the video store. Veasna went around the corner. Kratt's sister, Rina Moun (Rina), was ten to fifteen paces behind Kratt. Kratt heard a gunshot and went to the back of the store where he saw Veasna falling. Veasna was shot several times before he hit the ground. Gallegos then approached Veasna, stood over him and shot him repeatedly at point blank range. Kratt testified Gallegos "ran up and just started unloading his gun into [Veasna]." Kratt rushed Gallegos and punched him in the face. Kratt felt his left arm go numb. When Gallegos started to reload, Kratt ran past Rina who had kicked over a trash can in front of the video store in the hope it would distract Gallegos. Kratt ran back toward the parking lot and felt his left leg go numb. He had been shot in the arm and the leg. Kratt hid under a tarp covering a boat in storage.

While Kratt was hiding, he heard someone say, "Where did he go? We got to finish him off. . . ." At trial, Kratt testified he could not identify the speaker. However, at the emergency room on the night of the incident, Kratt told Long Beach police sergeant Chad Ellis he was certain it was the shooter who made the statements.

Long Beach police officers found Veasna's body in a pool of blood and shell casings. One of the officers removed a six inch knife from Veasna's hand. Long Beach police officers also found a screwdriver and a car club at the scene. A criminalist determined that eight fired cartridge casings found at the scene all had been fired by one weapon.

Kratt admitted that, a year earlier, he had been an associate of an Asian gang. However, he stopped associating with gang members after he was placed on probation. Kratt also admitted he took a screwdriver with him to the parking lot in his pocket but did not use it.

Veasna testified he went to the parking lot to talk to the individual who kicked his cousin and perhaps there would have been a fist fight. When Veasna arrived in the parking lot, six or eight individuals scattered. Veasna followed one of them to the gate of a house, ran into the yard and yelled, “who kicked my fucking cousin?” Veasna heard gunshots and was spun around by a bullet that struck him in the back, causing him to fall. At that point, a male stood over him and fired repeatedly. Veasna was shot in the spleen, the colon and the bladder. Veasna underwent an eight hour operation and was in the hospital a total of three months.

Veasna took a knife with him to the scene but testified he did not use it.

Rina testified she was outside Kratt’s apartment when she saw Veasna and Kratt walk hurriedly toward the parking lot. She sensed something was wrong, followed them and saw Gallegos shoot Veasna. Rina knocked over a trash can in an attempt to startle Gallegos after Gallegos aimed the gun “right at [Kratt’s] head.” Rina heard a click, followed by the sound of reloading. Rina ran and heard more gunshots.

At that point, Rina’s fiancé arrived in a car, grabbed Rina from the street and drove away with Rina on his lap. Rina saw Gallegos shoot at them as they drove from the scene. The front and back windshields of the car were broken out and there were bullet holes on the right side door.

Long Beach police detective Abel Morales testified Gallegos and Casteneda are well established members of a Long Beach gang. Kratt admitted to Morales he “used to be from” an Asian gang that is a rival of Gallegos’s gang.

During Morales’ testimony, the parties stipulated Casteneda pleaded guilty to criminal offenses arising from this incident.

Gallegos was arrested on January 26, 2005, in possession of a nine millimeter Beretta.

2. Defense case.

In the emergency room on the night of this incident, Kratt told Long Beach police Sergeant Chad Ellis he was approached by three male Hispanics at a traffic light on 7th Street. Kratt did not mention a parking lot or say that Gallegos threatened Kratt's family.

At the scene of the shooting, Rina told Long Beach police officer Felipa Baccari she was walking to the video store on 7th Street to get her brothers to play basketball. She saw Kratt and Veasna standing at the end of the video store in front of the driveway. A male Hispanic walked out from the driveway and shot Veasna at close range. Thirty seconds later, a second male Hispanic emerged from the same place as the first individual and "they" began shooting at her and her brother. The first male shot Veasna three or four times as he lay on the ground. The second shooter fired at Kratt.

Detective Morales testified Kratt and Rina both identified Casteneda in a photographic lineup as the individual who shot at Rina. Veasna told Morales he walked to the front of the video store and screamed at the people inside. He did not say he and Kratt ran into a parking lot and numerous individuals scattered.

3. Instructions, verdict and sentencing.

The trial court instructed the jury on attempted murder and attempted voluntary manslaughter on a theory of sudden quarrel or heat of passion.

The jury convicted Gallegos of the greater offense of attempted murder.

The trial court sentenced Gallegos to a prison term of 39 years and eight months plus 50 years to life. On count one, the trial court imposed the high term of 9 years, plus 10 years for the gang enhancement and 25 years to life for the personal discharge of a firearm causing great bodily injury. On count two, the trial court imposed a full consecutive identical sentence. The trial court also imposed a consecutive term of eight months for unlawful possession of a firearm and added one year to that term based on the criminal street gang enhancement.

DISCUSSION

1. *The trial court had no sua sponte obligation to instruct on attempted voluntary manslaughter on a theory of imperfect self-defense.*

Gallegos contends the evidence supported an instruction on attempted voluntary manslaughter on a theory of imperfect self-defense and the trial court erred in failing to instruct the jury on that theory.

Gallegos notes the evidence showed that when Kratt and Veasna entered the parking lot, the male Hispanics who were present scattered. Kratt and Veasna pursued Gallegos to his driveway and then down his driveway toward his home at the rear of the video store. Veasna admitted he was yelling and using expletives as he chased Gallegos. Also, Kratt had a screw driver and Veasna had a knife. Although both testified they did not use these weapons during the incident, the police found a knife in Veasna's hand and found a screwdriver on the sidewalk in the path of Kratt's flight. Additionally, the police found a car club, which is commonly used as a weapon. Gallegos suggests this car club may have been brought to the scene by Rina who had been near her car when she decided to follow Kratt and Veasna. The fact Rina turned over a trash can to startle Gallegos would have given him an additional reason to be afraid. Gallegos asserts this evidence was sufficient to permit the jury to conclude Gallegos was afraid for his life and that he shot in the good-faith belief in the need to act in self-defense.

Gallegos concludes the jury reasonably could have found Gallegos was in actual fear that his life was in imminent danger. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1189.) Thus, the error in failing to instruct on imperfect self-defense voluntary manslaughter was prejudicial under any standard of review.

We do not find Gallegos's argument persuasive.

Imperfect self-defense is not a true defense but is a shorthand description of one form of voluntary manslaughter which is a lesser included offense of murder. (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.) The doctrine of imperfect self-defense “is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. . . . The defendant’s fear must be of *imminent* danger to life or great bodily injury. ‘ “[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*” . . . ’ ” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

A trial court has a sua sponte duty to instruct on imperfect self-defense whenever the evidence is such the jury reasonably could conclude the defendant acted in the unreasonable but good faith belief in the need to defend. (*People v. Barton, supra*, 12 Cal.4th at pp. 200-201; *People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10.) “ ‘Substantial evidence’ in this context is ‘ “evidence from which a jury composed of reasonable [persons] could . . . conclude[.]” ’ that the lesser offense, but not the greater, was committed. [Citations.]’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) On appeal, we apply a de novo standard of review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Here, there was no evidence indicating Gallegos was in actual fear for his life when he shot Veasna. The evidence showed that, in the initial confrontation, Gallegos accused Kratt of vandalizing his car, threatened Kratt and his family and that Gallegos was present when Kratt was assaulted. When Kratt and Veasna returned, Gallegos ran toward the video store. Veasna and Kratt chased Gallegos. Kratt stopped in front of the video store and Veasna apparently got as far as inside the gate to Gallegos’s residence where he demanded that someone take responsibility for kicking Kratt. While he stood there, Gallegos shot Veasna several times from a distance. When Veasna fell to the ground, Gallegos approached Veasna, stood over him and fired repeatedly at him at point blank range. When Kratt rushed toward Gallegos to prevent further harm to Veasna, Gallegos shot him

once, reloaded and shot him again as he fled. As Kratt hid under the tarp, he heard Gallegos say he wanted to finish Kratt off.

This evidence does not suggest that when Gallegos shot at Veasna and Kratt, he actually believed he was in imminent danger of death or great bodily injury. Even if Gallegos were in fear when he ran from the parking lot, there was no evidence indicating he was in actual fear of death or great bodily injury when he shot Veasna. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824-825.)

Consequently, absent testimony from Gallegos, evidence of a statement attributed to him or other evidence indicating that when he fired at Veasna he was in actual fear of imminent death or great bodily injury, the trial court had no obligation to instruct on voluntary manslaughter on a theory of imperfect self-defense. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82; *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197-198.)

We note the trial court gave Gallegos every benefit of the doubt by instructing the jury on attempted voluntary manslaughter on a theory of heat of passion. However, the jury rejected attempted voluntary manslaughter and convicted Gallegos of the greater offense. Given that circumstance, we additionally conclude any error in failing to instruct on attempted voluntary manslaughter on a theory of imperfect self defense was harmless in that there does not appear to be any reasonable possibility the jury would have found Gallegos guilty of the lesser offense but not the greater. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. The reasonable doubt instruction.

Gallegos contends CALCRIM 220, the reasonable doubt instruction, is defective because it directs the jury to “compare” the evidence “received” at trial, thereby suggesting the jury should compare the prosecution’s evidence with the

evidence presented by the defense.² However the defense is not required to present evidence demonstrating reasonable doubt. Indeed, reasonable doubt “may well grow out of the lack of evidence in the case as well as the evidence adduced.” (*People v. Simpson* (1954) 43 Cal.2d 553, 566.) Also, Gallegos was likely to lose in a comparison of the prosecution’s evidence and the defense evidence because he did not testify and the witnesses he presented only raised inconsistencies in the victim’s accounts. Gallegos concludes the error requires reversal of his conviction.

Gallegos’s argument has been rejected by every court to consider it. (*People v. Zavala* (2008) 168 Cal.App.4th 772, 780-781; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1510; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1156-1157.)

In *Rios*, the appellant argued the phrase “to compare and consider all the evidence” improperly shifted the burden to the defense by allowing the jury to hold the absence of defense evidence against the defendant. *Rios* compared CALCRIM

² As given, CALCRIM No. 220 states: “The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of the crime and special allegation beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially *compare* and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.” (Italics added.)

220 to its predecessor, CALJIC No. 2.90.³ *Rios* explained, “CALCRIM No. 220 uses *verbs* requiring the jury to ‘compare and consider all the evidence that was received throughout the entire trial.’ CALJIC No. 2.90 uses *nouns* requiring ‘the entire comparison and consideration of all the evidence’ by the jury.” (*People v. Hernandez Rios, supra*, 151 Cal.App.4th at p. 1157.) *Rios* rejected the claim the instruction shifted the burden of proof and concluded that, to the extent there are grammatical differences between CALCRIM 220 and CALJIC No. 2.90, the defendant “fails to persuade us that those grammatical differences are material. The United States Supreme Court rejected a constitutional challenge to CALJIC No. 2.90 in part on the rationale that ‘the entire comparison and consideration of all the evidence’ language ‘explicitly told the jurors that their conclusion had to be based on the evidence in the case.’ [Citation.] The language [the defendant] challenges in CALCRIM 220 did just that.” (*People v. Hernandez Rios*, at p. 1157.)

People v. Stone (2008) 160 Cal.App.4th 323, 332 similarly found the “idea that the jury would interpret ‘compare’ to mean that guilt is to be determined by a balancing-of-the scales approach which compares the evidence offered by two sides” was undercut by other aspects of the instruction that told the jury not to consider the fact a criminal charge has been filed as evidence of guilt, to presume the defendant is innocent and to acquit unless the evidence proves guilt beyond a reasonable doubt. *Stone* concluded, and we agree, there is no reasonable likelihood the jury interpreted the instruction as requiring it to compare the evidence presented by the defense with the evidence presented by the prosecution.

³ CALJIC No. 2.90 provides, in relevant part, “Reasonable doubt is . . . that state of the case which, after *the entire comparison and consideration of all the evidence*, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” (CALJIC No. 2.90, italics added.)

In sum, Gallegos does not persuade us the previous cases that have rejected this issue were wrongly decided. Nor has Gallegos shown a reasonable likelihood the jury misunderstood or misapplied the instruction in a way that denied fundamental fairness. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 [116 L.Ed.2d 385].) Consequently, the claim of error fails.

3. *The term imposed on count two must be modified.*

Pursuant to section 667, subdivision (c)(7), a provision of the Three Strikes law, the trial court imposed a full consecutive term on count two and the related criminal street gang enhancement. However, the People dismissed the prior conviction allegation under the Three Strikes law after the trial court polled the jury. Gallegos contends that, absent an allegation under the Three Strikes law, the trial court should have computed the term on count two under section 1170.1, subdivision (a).

The People concede the error and it appears the concession is well taken.

The consecutive term imposed on count two should have been computed under section 1170.1 as follows: 2 years and 4 months (one-third the middle term of 7 years) for the substantive offense, plus 3 years and 4 months for the criminal street gang enhancement (one-third of 10 years), plus the indeterminate term of 25 years to life for the personal discharge of a firearm causing great bodily injury. Thus, the total term as to count 2 is 5 years and 8 months, plus 25 years to life. The total term on all three counts is 26 years and 4 months plus an indeterminate term of 50 years to life.

DISPOSITION

The judgment is modified to reflect a consecutive term computed under section 1170 as to count two. In all other respects, the judgment is affirmed. The trial court shall prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting a total term of 26 years and 4 months plus 50 years to life in prison. As so modified, the judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.